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Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554

JAN 25 1993

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

In the Matter of )  
 )  
Implementation of Sections )  
12 and 19 of the Cable Television )  
Consumer Protection and )  
Competition Act of 1992 )  
 )  
Development of Competition and )  
Diversity in Video Programming )  
Distribution and Carriage )  
 )

MM Docket No. 92-265

COMMENTS OF BELLSOUTH TELECOMMUNICATIONS, INC.

William B. Barfield  
Thompson T. Rawls II

Suite 1800  
1155 Peachtree Street, N.E.  
Atlanta, Georgia 30367-6000  
(404) 249-2706

Attorneys for:

BELLSOUTH TELECOMMUNICATIONS, INC.

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COMMENTS OF BELL SOUTH TELECOMMUNICATIONS, INC.

BellSouth Telecommunications, Inc. ("BellSouth")  
submits these comments in response to the Commission's video  
programming distribution and carriage Notice of Proposed  
Rulemaking (Notice), released December 24, 1992.<sup>1</sup>

I. Summary Of Comments

In these comments, BellSouth urges the Commission to  
clarify when programming distributors and telephone  
companies who use video dialtone facilities are  
"multichannel video programming distributors" within the  
meaning of the provisions of the Cable Act of 1992. Next,  
BellSouth submits that the terms of the 1992 Cable Act  
require that any exclusive programming distribution  
agreement between a cable operator and a satellite cable or  
satellite broadcast programming vendor in which the cable  
operator has an attributable interest is prohibited as a

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<sup>1</sup> Notice of Proposed Rulemaking, MM Docket No. 92-265,  
rel. December 24, 1992 (Notice).

matter of law, unless specifically grandfathered by the 1992 Cable Act or determined in advance by the Commission to be in the public interest. BellSouth also urges the Commission to adopt the broadcast attribution rules for purposes of determining affiliated interests in this proceeding. Additionally, BellSouth urges the Commission to take action in other proceedings to allow the use of these same standards to determine cognizable affiliate interests among and between television broadcasters, cable companies and telephone companies under the Commission's other rules and regulations governing these industries.

II. The Commission Should Clarify When Telephone Companies And Video Programming Customers Using Video Dialtone Facilities Qualify As "MultiChannel Video Programming Distributors" Under The Act

As explained in the Notice, Section 19 of the Cable Act of 1992 was adopted by Congress for the purpose of:

[P]romoting the public interest by increasing competition and diversity in the multichannel video programming markets; increasing the availability of satellite cable and broadcast programming to persons in rural and other areas that are not currently able to receive such programming; and encouraging the development of communications technologies. To accomplish these purposes, Section 628(b) makes it unlawful for a "cable operator, a satellite cable programming vendor in which the cable operator has an attributable interest, or a satellite broadcast programming vendor" to engage in "unfair methods of competition or unfair or deceptive acts or practices" whose purpose or effect is to "hinder significantly" or to "prevent" delivery of programming by multichannel video programming distributors. (emphasis added).<sup>2</sup>

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<sup>2</sup> Notice at para. 6.

Recognizing that the nondiscrimination provisions of Section 628(b) were adopted to protect the interests of "multichannel video programming distributors," the Commission seeks comments on the full scope of the meaning of these terms.<sup>3</sup>

The Cable Act of 1992 defines a "multichannel video programming distributor," in relevant part, as:

A person . . . who makes available for purchase, by subscribers or customers, multiple channels of video programming.<sup>4</sup>

In the typical video dialtone arrangement, it is the video dialtone programming customer, not the telephone company, who makes the video programming directly available for purchase by subscribers. This is because the current cable-telephone company cross-ownership restrictions preclude telephone companies from providing video programming directly to subscribers over video dialtone facilities in non-rural telephone service areas.<sup>5</sup>

The video dialtone programming customer occupies a role similar to that of a cable operator who uses telephone company provided cable channel service to deliver its video programming to subscribers. When a franchised cable

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<sup>3</sup> Notice at n.13.

<sup>4</sup> 47 U.S.C. Section 531(12). The Cable Act defines "video programming" as "programming provided by, or generally considered comparable to, programming provided by, a television broadcast station." 47 U.S.C. Section 522(16).

<sup>5</sup> 47 U.S.C. Section 533(b).

operator elects to use common carrier channel service to deliver its video programming, it is the cable operator, not the common carrier transport provider, who acts as the "multichannel video programming distributor." Thus, a programming customer using video dialtone facilities could qualify as a "multichannel video programming distributor", provided it provides a sufficient number of video programming channels to meet the definition.

The Commission has tentatively proposed for purposes of determining retransmission consent obligations under the Act that "where there is a differentiation between an entity performing a service delivery function and an entity selling programming that is delivered over the facilities of another," the term "multichannel video programming distributor" should apply to the entity "directly selling programming and interacting with the public."<sup>6</sup> The Commission also states that where there is a chain of distribution to subscribers involving more than one multichannel video programming distributor, "it would appear consistent with the objectives of the 1992 Act for the obligation involved to inure to the distributor in the chain that interacts directly with the public. Thus, for example, the obligation would not fall on a microwave common carrier

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<sup>6</sup> In the Matter of Implementation of Cable Television and Consumer Protection and Competition Act of 1992, Broadcast Signal Carriage Issues, MM Docket No. 92-259, Notice of Proposed Rulemaking, rel. November 19, 1992.

delivering multiple channels of programming to cable system customers, but would, instead, be the obligation of the cable systems involved."<sup>7</sup> BellSouth supports these interpretations. For similar reasons, the definition of what constitutes a "multichannel video programming distributor" for purposes of the video programming access requirements of the Act does not encompass telephone companies merely providing video dialtone.<sup>8</sup>

There are two situations, however, in which a telephone company providing video dialtone facilities could qualify as a multichannel video programming distributor. First, a telephone company choosing to deploy video dialtone facilities in a rural telephone service area, as defined by the Commission's rules,<sup>9</sup> could qualify as a multichannel video program distributor if it also provides multiple channels of video programming directly to subscribers.<sup>10</sup> Second, a telephone company providing multichannel video

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<sup>7</sup> Id.

<sup>8</sup> Likewise, telephone companies providing gateway services through which video programming offered by others may be accessed by subscribers are not providing video programming directly to subscribers. At most, such telephone companies are entities in the chain of distribution performing a service delivery function and not "directly selling programming and interacting with the public."

<sup>9</sup> 47 U.S.C. Section 533(b)(3).

<sup>10</sup> Telephone Companies are not barred under the terms of the Cable Act from providing video programming directly to subscribers over cable systems or video dialtone facilities in rural areas. See, 47 U.S.C. Section 533(c).

programming directly to customers under a "good cause" waiver could also qualify.<sup>11</sup> Of course, in each case, the telephone company would still have to satisfy the minimum video programming and channel requirements necessary to constitute a multichannel distributor under the Act.

Treating telephone companies in these two situations as multichannel video programming distributors is consistent with the policy objectives of the Cable Act of 1992. Such interpretation advances the congressional objectives of promoting increased competition and diversity in the multichannel video programming market and of increasing the availability of programming to persons in rural and other areas not currently able to receive such programming. It encourages the development of communications technologies by providing access to programming which will, in turn, provide additional revenues to spur investment in the construction and deployment of video dialtone facilities. Thus, there are important public interest reasons why the Commission should hold that a video dialtone telephone company acting in either of the above capacities may qualify as a "multichannel video programming distributor" under the terms of the Act.

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<sup>11</sup> 47 U.S.C. Section 533(b)(4).

III. Exclusive Contracts Between Cable Operators And  
Affiliated Satellite Cable Or Broadcast Programming  
Vendors Are Unlawful Unless First Approved By The  
Commission Under Section 628(c)(4) Of The Act.

"For administrative reasons," the Commission concludes that it would not be practical to require prior approval of exclusive programming arrangements, and alternatively proposes to enforce the statutory provisions prohibiting such agreements through the Commission's complaint process.<sup>12</sup>

BellSouth submits that the statutory terms of the Cable Act do not allow the Commission to proceed in this fashion. The Cable Act of 1992 clearly treats all such exclusive agreements, other than those prior contracts grandfathered under Section 628(h), as unlawful unless first found to be in the public interest by the Commission pursuant to Section 628(c)(4) of the Act.

The language of the statute indicates that exclusive contracts described in Section 628(c)(2)(C) of the Act, if not specifically grandfathered under Section 628(h), are unlawful. There are no statutory exceptions to this prohibition.

Section 628(c)(2)(C) states, in relevant part, that the Commission's regulations to be promulgated shall:

. . . (C) prohibit practices, understandings, arrangements, and activities, including exclusive contracts for satellite cable programming or satellite broadcast programming between a cable

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<sup>12</sup> Notice p. 33.

operator and a satellite cable programming vendor or satellite broadcast programming vendor, that prevent a multichannel video programming distributor from obtaining such programming from any satellite cable programming vendor . . . or any satellite broadcast programming vendor in which a cable operator has an attributable interest for distribution to persons in areas not served by a cable operator as of the date of enactment of this section. (emphasis added).

The Cable Act does not provide any public interest exceptions to this blanket prohibition. The only public interest exceptions allowed by the Act are limited to contracts which involve the distribution of programming "to persons in areas served by a cable operator" as provided in Section 628(c)(2)(D), and then only if found by the Commission to be in the public interest pursuant to the criteria set forth in Section 628(c)(4) of the Act.

Section 628(c)(2)(D) provides that the Commission's regulations shall:

(D) with respect to distribution to persons in areas served by a cable operator, prohibit exclusive contracts for satellite cable programming or satellite broadcast programming between a cable operator and a satellite cable programming vendor . . . or a satellite broadcast programming vendor in which a cable operator has an attributable interest, unless the Commission determines (in accordance with paragraph (4)) that such contract is in the public interest. (emphasis added).

Section 628(c)(4) provides, in relevant part:

(4) PUBLIC INTEREST DETERMINATIONS ON EXCLUSIVE CONTRACTS. - In determining whether an exclusive contract is in the public interest for purposes of paragraph (2)(D), the Commission shall consider each of the following factors with respect to the effect of such contract on the distribution of

video programming in areas that are served by a cable operator. . .

Clearly, under a logical reading of the above statutory terms, exclusive programming agreements are illegal as a matter of law, unless the Commission first determines such agreements to be in the public interest.

In determining the legality of such contracts, Section 628(c)(4) requires the Commission to consider such factors as (1) the effect of the contract on the development of competition in video programming distribution markets, (2) the effect on competition from multichannel video programming distribution technologies other than cable, (3) the effect on the attraction of capital investment in the production and distribution of new satellite cable programming, (4) the effect on diversity of programming, and (5) the duration of the exclusive contract.<sup>13</sup> It would take an unusually strained reading of the statute to conclude that it permits the Commission to render these findings after the exclusive contract has been implemented. Such an interpretation is contrary to the statutory objective of prohibiting cable operators and satellite cable and broadcast programming vendors from engaging in such activities and of promoting nondiscriminatory access to programming.

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<sup>13</sup> Cable Act of 1992, Section 628(c)(4).

If the Commission does not require prior review and approval of exclusive programming contracts, then the Commission is in effect saying that the very evils the statute is designed to prevent are outweighed by Commission concerns over ease of regulatory administration. Such interpretation cannot be supported by the legislative history or the unambiguous, plain language of the Act. BellSouth urges the Commission to reject any such notion in favor of a prior approval requirement. The objectives of the Act will be seriously undermined if the Commission permits such illegal contracts to take effect.

IV. The Commission Should Adopt The Television Broadcast Attribution Standard For Determining Affiliate Interests In This And In Its Video Dialtone Proceeding

In the Notice, the Commission observes that:

In order to determine whether a cable operation is vertically integrated under the 1992 Cable Act, we must establish a threshold at which an ownership interest will be considered attributable. The Senate Report states that "[I]n determining what is an attributable interest, it is the intent of the Committee that the FCC use the attribution criteria set forth in 47 C.F.R. Sections 73.3555 (notes) or other criteria the FCC may deem appropriate." the Senate version of the programming access provisions were not adopted. The House version which was adopted with amendments, uses the term "attributable interest" but does not define an attribution benchmark.<sup>14</sup>

The Commission seeks comment on whether it should define attributable interests in this proceeding with reference to

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<sup>14</sup> Notice at para. 9.

the attribution threshold generally applicable to the broadcasting industry.<sup>15</sup>

BellSouth urges the Commission to adopt an affiliated attribution standard which can be applied equally to television broadcasters, cable operators and telephone companies under all the Commission's rules. The public interest advantages of administering and operating under a uniform set of attribution rules for the larger communications industry are obvious and outweigh any potential shortcomings of such approach.

It is incumbent upon the Commission to recognize the dynamic changes taking place in the communications industry. As the television broadcast, cable and telephone industries continue to converge, the Commission should avoid adopting narrowly focused rules which create competitive distortions in the broader marketplace based on disparity of regulatory treatment. With the exercise of proper foresight in this and other proceedings, the Commission can avoid such a result.

For purposes of determining attributable affiliate interests in this proceeding, the Commission should adopt the same attribution rules which it applies to the broadcast industry, including any subsequent revisions it might adopt in the broadcast attribution proceeding pending before the

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<sup>15</sup> Id. Also, See, 47 C.F.R. Section 73.3555 n.2(b).

Commission.<sup>16</sup> Likewise, in its video dialtone proceeding, the Commission should grant those petitions for reconsideration arguing that the broadcast attribution rules be applied, without modification, to video programming - telephone company affiliate interests.<sup>17</sup>

If the Commission does not unify the attribution rules applied to these various business relationships and industries, an unnecessarily complicated and potentially unmanageable regulatory situation will likely develop. The Commission and the industry will become embroiled in unproductive disputes which focus on subtle and increasingly insignificant distinctions between the array of services companies provide and their relative ability to improperly influence markets based on different standards of affiliation with other companies. The Commission should anticipate a rapidly changing communications environment in which cable companies, broadcasters and telephone companies are engaged in a multitude of affiliate, competitive and customer relationships.

The Commission should move the communications industry away from multiple sets of discreet attribution rules. Such

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<sup>16</sup> See, Notice of Proposed Rulemaking, MM Docket No. 92-51, 7 FCC Rcd 2654 (1992).

<sup>17</sup> See, BellSouth's Opposition To Petitions For Reconsideration, filed November 12, 1992, pp. 6-7, in CC Docket No. 87-266. For example, the Commission should apply the single majority shareholder rule for purposes of determining prohibited affiliated interests under its cable-telephone company cross-ownership rules.

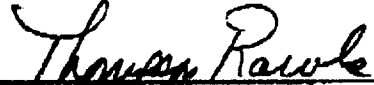
rules are too narrow in focus and typically only address a subset of possible business relationships in which these parties will increasingly find themselves. To continue down this path will burden the Commission and the larger communications industry with additional inefficiencies and competitive inequities in the application of the Commission's regulations. Disparate attribution standards will invite service providers to rely upon regulatory gamesmanship to obtain competitive advantages as communications markets continue to converge.

V. Conclusion

For the above reasons, BellSouth requests that the Commission adopt rules and regulations implementing the programming access and distribution provisions of the Cable Act of 1992, consistent with these comments.

Respectfully submitted,

BELLSOUTH TELECOMMUNICATIONS, INC.

By:   
William B. Barfield  
Thompson T. Rawls II

Their Attorneys

1155 Peachtree Street, N.E.  
Suite 1800  
Atlanta, Georgia 30367-6000  
(404) 249-2706

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